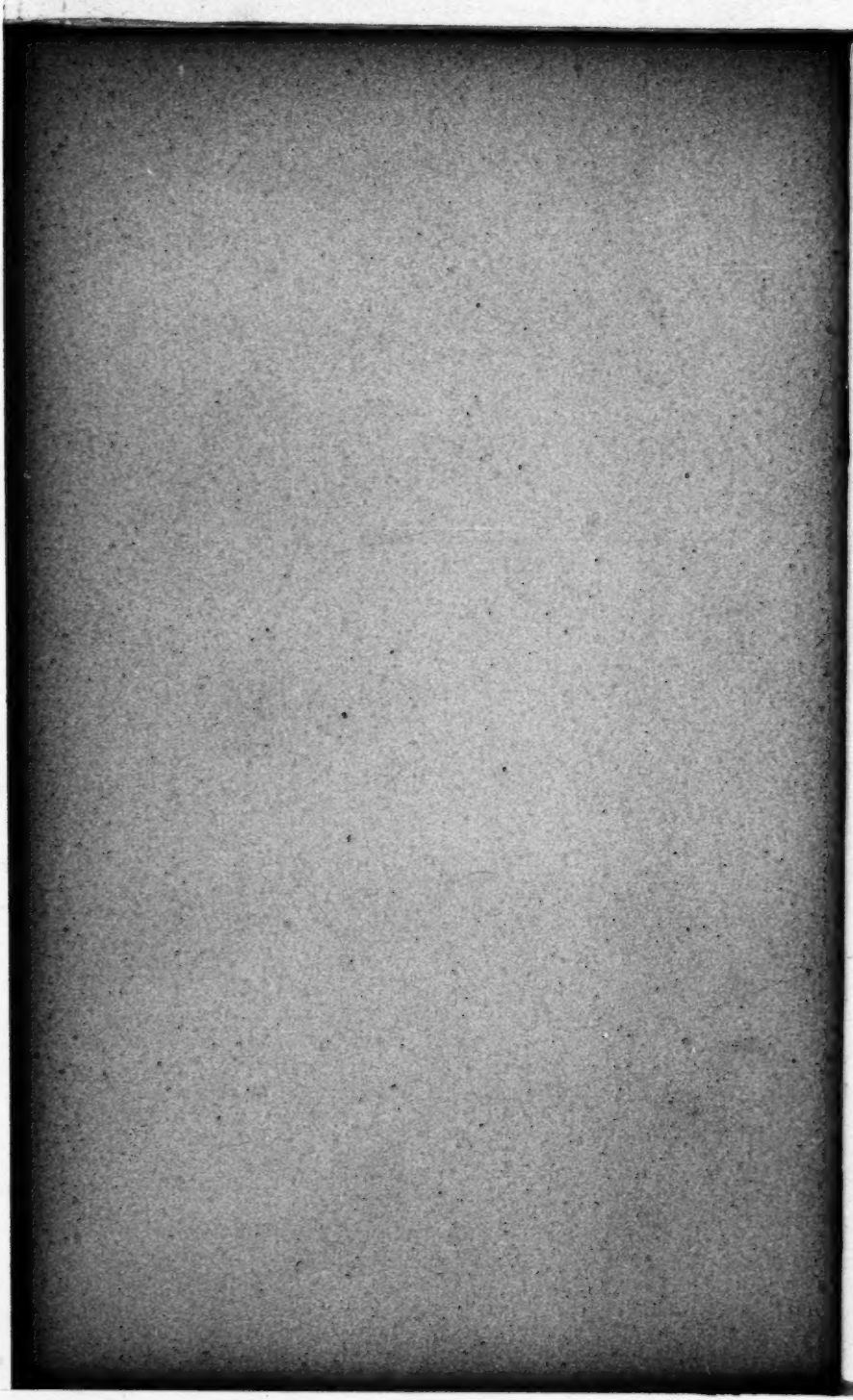

SUPREME COURT, U. S.

FILED

APR 17 1974

MICHAEL RODAK, JR., C

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

No. 72-1410

JOEL EDELMAN, DIRECTOR OF ILLINOIS DEPARTMENT OF PUBLIC AID, *et al.*,

Original Petitioners,

v.

JOHN JORDAN, *et al.*,

Original Respondents, Petitioners for Rehearing.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Now comes John Jordan, by his attorney, and petitions this Court for an order (1) vacating its previous decision and judgment, and (2) granting a rehearing of this cause. In support of this petition, John Jordan states as follows:

I.

TO REQUIRE PERSONS TO SEEK REDRESS IN STATE COURTS FOR VIOLATIONS OF SECTION 1 OF THE CIVIL RIGHTS ACT OF 1871 IS TOTALLY AT ODDS WITH THE LANGUAGE OF THAT ACT, THE INTENT OF ITS FRAMERS, AND THE LEGISLATIVE HISTORY SURROUNDING ITS ADOPTION.

The majority opinion reaffirms the principle that public aid recipients may bring an action against state public aid officers under Section 1 of the Civil Rights Act of 1871 (now Section 42 U.S.C. §1983) to invalidate state laws in contravention of the Social Security Act, and thereby in contravention of the Supremacy Clause, Art. 6, cl. 2. (*See Hagans v. Lavine*, ____ S. Ct. ____ (March 25, 1974)). Further, a federal court may grant prospective mandatory injunctive relief against said state officers, notwithstanding the Eleventh Amendment. On the other hand, a federal court in such a 1983 action is barred by the Eleventh Amendment from granting any relief against state officers[1] which is retrospective in nature, or, in other words, relief which provides redress to the plaintiffs in the case who are actually injured by the unconstitutional state laws. Thus, the plaintiffs must pursue in the state courts their 1983 claims for redress of "rights, privileges, and immunities secured by the Constitution and laws."

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[1] The Court reaffirms that retrospective relief against counties and county officers is not barred by the Eleventh Amendment. *Edelman v. Jordan*, footnote 12 (Sl. Op. at 15-16). However, the Court overlooks the fact that the retrospective relief in this case was in fact directed against "all of the County Department of Public Aid in the State of Illinois." *Edelman v. Jordan*, footnote 5.

It is respectfully submitted that the proposition that some relief under a 1983 claim against a state officer acting in violation of the United States Constitution may not be heard in the federal courts, but instead is left to the state courts of the several states, is so totally at odds with the language of the Civil Rights Act of 1871, the intent of the framers of that legislation, and the legislative history surrounding its adoption, that this Court should grant the petition for rehearing and reset this case for reargument.

First, it is necessary to examine the entire original language of Section 1 of the Civil Rights Act of 1871.

> "That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases." 17 Stat. 13

Although the present Section 1983 ends with the word "redress," the latter part of the original section is

significant in establishing that the full panoply of remedies were to be available to the federal court to provide "redress" for the deprivation of "rights, privileges, and immunities secured by the Constitution." That Congress intended that complete relief was to be granted for violations of Section 1 is also indicated by the contrast between the sweeping language with respect to remedies found in Section 1 and the language, for example, of Section 6, of the same Act, limiting the relief to damages resulting from proscribed conduct. Moreover, Section 1 expressly incorporated the remedies available under the Civil Rights Act of 1866, entitled "An Act to protect all Persons in the United States in Their Civil Rights, *and furnish the Means of Their Vindication.*"[2] (Emphasis added.) Thus the language of Section 1 of the Civil Rights Act of 1871 manifests the congressional intent to provide for the full range of remedies, both legal and equitable, to be available to the federal courts in suits against state officers, and offers no support whatsoever for the conclusion that equitable remedies, retrospective in nature, were barred. As stated in *Monroe v. Pape*, 365 U.S. 167, 178: "It was precisely that breadth of the remedy which the opposition emphasized."

Moreover, the debates in Congress establish unequivocably that Section 1 of the Civil Rights Act of 1871 was designed, *inter alia*, (1) to provide a remedy

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[2] The Civil Rights Act of 1866 expressly provided

"that the district courts of the United States within their respective districts, shall have . . . cognizance . . . of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the state or locality where they may be any of the rights secured to them by the first section of this act; . . . ." 14 Stat. 27

against the States; (2) that the States act through their officers and therefore this section provided for actions against state officers in their official capacity; (3) that such remedy was to be available in the federal courts; (4) that the jurisdiction of the federal courts was being expanded to allow for such suits; and (5) that the federal courts were to fashion whatever remedy was necessary in order to provide "redress" to the injured person.

Any analysis of the original meaning and intent of Section 1 of the Civil Rights Act of 1871 must begin with the speech of Mr. S. Shellabarger, the sponsor of the bill. Cong. Globe, 42nd Cong., 1st Sess., Appendix at 67-71. There can be no doubt that he understood Section 1 as providing a remedy against the States through its officers. He asserted that "the United States always has assumed to enforce, as against the States, and also persons, every one of the provisions of the Constitution," and that there were situations "where the court secures the rights or the liabilities of persons within the States, as between such persons and the States." *Id.* at 69. After describing these situations, he states:

> "And, sir, every one of these—the only provisions where it was deemed that legislation was required to enforce the constitutional provisions—the only three where the rights or liabilities of persons in the States, *as between these persons and the States,* are directly provided for, Congress has by legislation affirmatively interferred to protect or to subject such persons." *Id.* at 69-70 (Emphasis added.)

Moreover, he leaves no doubt that Section 1 is designed to do more than merely invalidate state laws.

"But that would not do where personal rights were invaded by the States. Congress has never hesitated to provide the necessary affirmative legislation to enforce the personal rights which the Constitution guarantees, *as between persons in the State and the State itself.*" *Id.* at 70. (Emphasis added.)

That these rights were to be enforced in the federal courts, and not in the state courts is also emphasized.

"To say that Congress can do no such thing as to make any laws so enforcing these rights, nor open the United States courts to enforce any such laws but must leave all the protection and law-making to the very States which are denying the protection, is plainly and grossly absurd." *Id.* at 68.

That Section 1 was intended to reach the States through its officers was also understood by other members of Congress.

"For the neglect or refusal of a State to perform a constitutional duty, the remedies and powers of enforcement given to the General Government are few and restricted. It cannot perform the duty the Constitution enjoins upon the State . . . Nor do prohibitions upon States authorize Congress to exercise the forbidden power. It may doubtless require state officers to discharge duties imposed upon them as such officers by the Constitution of the United States. A State office must be assumed with such limitations and burdens, such duties and obligations, as the Constitution of the United States attaches to it . . . What more appropriate legislation for enforcing a constitutional prohibition upon a State than to compel State officers to observe it? Its violation by the State can only be consummated through the officers by whom it acts . . . If the federal government can compel state

officers to act under State laws in the collection of a money bond, can it not insist upon their performance of duties imposed by the Constitution upon State officers by means of which equal protection is secured for life and person?" Cong. Globe, 42nd Cong., 1st Sess., App. at 314 (Burchard)

* * *

"The Civil Rights and enforcement bills heretofore passed provided for the punishment of those acting as state officers who attempted to execute the laws of a state in conflict with the Constitution of the United States. Is not an individual acting as a state officer, upon whom, as such officer, the Constitution and laws of the United States impose the performance of those duties, also amenable to laws of the United States for their nonperformance? . . .

"The bill thus amended will—(1) afford further redress for violations under State authority of constitutional rights. . . ." *Id.* at 315

Similarly, Senator Morton stated:

"The Government can act only upon individuals. It cannot prevent the Legislature of a State from passing an act or compel the passage of an act . . . The legislation which Congress is authorized to enact must operate, if at all, upon individuals.

* * *

"We are not proposing to tear up what has been done, to reconstruct again, but simply to provide for the protection of life and property, to enforce rights that are guaranteed by the Constitution and laws of the United States." *Id.*, App. at 251.

The proposition that the federal courts were being granted the judicial power to hear, decide, and grant

redress in such suits against state officers, in contradistinction to the state courts, was also commonly understood by both the proponents and opponents of the bill.

> "Its whole effect is to give the Federal Judiciary that which now does not belong to it—a jurisdiction that may be constitutionally conferred upon it, I grant, but that has never yet been conferred upon it . . . I am certainly not in favor of denying to any man who is deprived unlawfully of his rights, his privilege, or his immunity, under the Constitution of the United States, that redress to which every man is entitled whose rights are violated; but I do think that it is a most impolitic provision, that in effect may transfer the hearing of all such causes into the federal courts." 42nd Cong., 1st Sess. App. at 216 (Senator Thurman)

> "[Section 1] is a covert attempt to transfer another large portion of jurisdiction from the State tribunals, to which it of right belongs, to those of the United States." *Id.* at App. 50 (Kerr)

> "I shall say very little about the first section which is the least objectionable of the first four sections, for I would admit that the federal courts could, in a certain way already provided, take cognizance of the offenses therein mentioned, but I object to it on the ground that it is a delay of justice . . . It does not even give the state courts a chance to try questions, or to show whether they will try the questions that might come before them under the first section of the Fourteenth Amendment, fairly or not. It takes the whole question away from them in the beginning." *Id.* at 86 (Storm)

> "They ask us to take away from the local courts of the States their entire criminal and civil jurisdiction because under the broad description of

'rights' craftily super-added to the terms, 'privileges, and immunities,' are comprehended all the things of which courts can take cognizance." *Id.* at 88 (Storm)

"The first section of this bill was designed by its author, and will be construed by federal courts, as transferring all actions of law and suits in equity and all offenses against the person or property from the state to the federal courts." *Id.* at 91 (Duke)

Finally, the debates leave no doubt that the federal courts were being authorized to provide "redress," the express language of Section 1, to persons whose rights, privileges, and immunities secured by the Constitution were violated under color of state law.

"This Act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed . . . As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people." *Id.* at App. 68 (Shellabarger)

"But the chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe the last clause of the first

section empowers Congress to step in and provide for doing *justice* to those persons who are thus denied equal protection." (Emphasis added.) *Id.* at 153 (Garfield)

"I now come to the question of constitutionality: 1. whether or not Congress may provide for *redress* in the Federal courts for infringements or deprivations of rights under the Constitution and laws of the United States.

* * *

"It is clear that rights, privileges, and immunities under the Constitution and laws of the United States are proper subjects for the *jurisdiction* of the Federal courts." (Emphasis added.) *Id.* at App. 79 (Perry)

"1. Afford an injured party *redress* in the United States courts against any person violating his rights as a citizen under claim or color of state authority." *Id.* at App. 313 (Burchard) (Emphasis added.)

"As to the civil remedies for a violation of these privileges . . . the injured party should have an original action in our Federal courts so that by *injunction* or the recovery of damages he could have relief. . . ." Cong. Globe, 42nd Cong., 1st Sess. at 501. (Senator Frelinghuysen) (Emphasis added.)

In summary, then, there can be no doubt that the Congress in 1871 fully intended that Section 1 was designed to provide complete redress in the federal courts to persons whose constitutional rights were violated by the State acting through its officers. As stated in *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961), Section 1 had

"three main aims. *First*, it might, of course, override certain kinds of state laws. . . . *Second*, it provided a remedy where state law was inadequate. . . . The *third* aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."

* * *

"It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts." *Id.* at 180.

* * *

"Opponents of the Act, however, did not fail to note that by virtue of §1 federal courts would sit in judgment on the misdeeds of state officers." *Id.* at 182.

Now, then, the question must be asked: what about the Eleventh Amendment to the United States Constitution? First, not once was the Eleventh Amendment mentioned throughout the entire debates on the Civil Rights Act of 1871 by any congressman, including the opponents who raised every conceivable constitutional objection. This is strongly supportive of either the conclusion that no one considered the Eleventh Amendment applicable to suits by a citizen of a state against either his own State, or the officers thereof, or that whatever immunity from suit states enjoyed, Congress had the power, and was exercising that power, to override that immunity from suit in federal courts.

Second, any suggestion that a state officer might insulate his actions from federal court scrutiny under the mantle of "states' rights" or the sovereign immunity of states must be placed in the context of the Reconstruction Era. See generally, H. Flack, *The Adoption of the Fourteenth Amendment* (1908); J.

TenBrock, *The Anti-Slavery Origins of the Fourteenth Amendment* (1951).

> " 'Sensitiveness to 'states' rights,' fear of rivalry with state courts and respect for state sentiment were swept aside by the great impulse of national feeling borne of the Civil War. Nationalism was triumphant; in national administration was sought its vindication. The new exertions of federal power were no longer trusted to the enforcement of state agencies.' Frankfurter and Landis, The Business of the Supreme Court, 64 (1928)" *Steffel v. Thompson*, ____ S. Ct. ____ n. 13 (1974)

> "The mischievous doctrine of state sovereignty . . . is still the doctrine of the unreconstructed rebels of the South and the Democratic party of the North, as appears from this debate." 42nd Cong., 1st Sess. at 487 (Tyler)

See also, Zwickler v. Koota, 389 U.S. 245 (1967); *Mitchum v. Foster*, 407 U.S. 225 (1972).

Against this historical background must be tested Justice Rehnquist's statement that

> "it has not heretofore been suggested that §1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself." *Edelman v. Jordan*, ____ U.S. ____ (1974) (Slip Op. at 24-25)

On the contrary, the notion that a state officer sued under Section 1983 could claim the immunity of the State under the Eleventh Amendment is so totally at odds with the original understanding of that section, and the contemporary history, that the members of the majority must re-examine their position.

II.

THE RELATIONSHIP BETWEEN THE FOURTEENTH AMENDMENT AND THE ELEVENTH AMENDMENT MUST BE CONFRONTED IN THIS CASE BECAUSE THE ACTIONS OF THE DEFENDANTS HEREIN WERE IN VIOLATION OF THE FOURTEENTH AMENDMENT.

In re-examining this issue this Court must focus on Section 5 of the Fourteenth Amendment which provides:

> "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

There can be no doubt that pursuant to this Section 5, Congress is empowered to provide for suits in the federal courts to enforce the Fourteenth Amendment against states and state officers acting on behalf of states notwithstanding the Eleventh Amendment. *Suing the State Under Title VII in the Face of The Eleventh Amendment*, 1973 Wis. L. Rev. 1099, 1111-1123 (1973); *see Katzenbach v. Morgan*, 384 U.S. 641 (1966). And that is precisely what Section 1983 does.

The next question to be considered is whether it is significant that in the instant case there has only been a finding that the actions of the state defendants were contrary to the Social Security Act, and thereby in contravention of the Supremacy Clause of the U.S. Constitution (*Hagans v. Lavine*, _____ U.S. _____ (March 25, 1974), and not a denial of equal protection or due process as guaranteed by the Fourteenth Amendment. As Justice Marshall indicated, *Edelman v. Jordan*, _____ U.S. _____ n.2 (1974) (Slip Op. at 6-7) (dissenting opinion), the majority did not reach the question of whether the Fourteenth Amendment limited the applicability of the Eleventh Amendment.

However, the relationship between the Fourteenth Amendment and the Eleventh Amendment must be confronted in this case because the actions of the defendants in this case were in violation of the Fourteenth Amendment to the United States Constitution.

The second sentence of Section 1 of the Fourteenth Amendment reads:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Since the *Slaughterhouse Cases,* 16 Wall. (83 U.S.) 36 (1873), this provision has been interpreted as protecting those rights of citizens "which owe their existence to the Federal government, its national character, its Constitution, or its laws." *Id.* at 79. Certainly, foremost among these privileges and immunities of national citizenship is the primacy of federal laws embodied in the Supremacy Clause of the United States Constitution. As the dissent by Justice Field recognized, the interpretation by the majority of the "privileges and immunities" clause of the Fourteenth Amendment resulted in, at the very least, a re-assertion that state laws must give way to the primacy of federal laws as guaranteed by the Supremacy Clause.

> "If this inhibition . . . only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States . . . no state could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the constitution and the laws of the United States always controlled any state legislation of that character." *Id.* at 96.

Thus, it was understood by both the majority and the dissenting judges in the *Slaughterhouse Cases*, that the majority's interpretation of the "privileges and immunities" clause of the Fourteenth Amendment meant that the enactment of state laws in contravention of federal laws were a violation of the rights of citizens under both the Fourteenth Amendment and the Supremacy Clause. Thus, in this case, when the Director of the Illinois Department of Public Aid promulgated a statewide regulation in violation of the Social Security Act, he abridged John Jordan's privileges and immunities guaranteed by the Fourteenth Amendment and the Supremacy Clause. As recognized in *Hagans v. Lavine*, ____ S. Ct. ____ (March 25, 1974), such a claim "although denominated 'statutory,' is in reality a constitutional claim arising under the Supremacy Clause."

Moreover, as this Court recognized in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), Section Five of the Fourteenth Amendment granted Congress discretion to decide what laws were appropriate to secure the amendment's guarantees. In this case, Congress, in enacting Section 1 of the Civil Rights Act of 1871, deemed it necessary to provide for a federal cause of action in the federal courts for persons who were deprived of rights secured by the United States Constitution, including certainly the Supremacy Clause of the United States Constitution. In essence, Section 1 was designed to enforce the entire Constitution, and to provide a remedy in federal courts therefor. To vindicate the supremacy of federal laws was a paramount objective of the Radical Republicans, and the federal judiciary was entrusted with that responsibility.

> "We must remember that it was states' rights, perverted I admit from their true significance, that

> arrayed themselves against the nation and threatened its existence. . . . Federal laws and Federal rights must be protected whether domestic laws are interfered with or not, because the Constitution and the laws made in pursuance thereof are the supreme law of the land." 42nd Cong., 1st Sess. at 502 (Frelinghuysen)

In conclusion, then, it is submitted that this Court must resolve in this case, the relationship between the Fourteenth Amendment and the powers granted Congress in Section 5 of that Amendment, and the Eleventh Amendment.

Lastly, if this Court considers a violation of the Supremacy Clause not to be a violation of the privileges and immunities clause of the Fourteenth Amendment, any distinction between violations of the Fourteenth Amendment, and other constitutional violations, in particular Supremacy Clause violations, would force lower courts to decide Fourteenth Amendment issues in all cases, contrary to the established doctrine that Supremacy Clause claims should be "decided first and the former not reached if the statutory claim [Supremacy Clause] was dispositive. *California Human Resources Department v. Java*, 402 U.S. 121, 124 (1971); *Dandridge v. Williams, supra*, 397 U.S. at 475-476; *Rosado v. Wyman, supra*, 397 U.S. at 402; *King v. Smith, supra.*" *Hagans v. Lavine*, ____ U.S. ____ , 42 U.S.L.W. at 4386 (March 25, 1974). For example, in this case, if the majority opinion is not altered, the plaintiffs, on remand, will have to litigate their claim that the actions of the defendants were in violation of the equal protection clause of the Fourteenth Amendment. Such a result is neither a sound contribution to the efficient administration of justice, nor consistent with established principles of constitutional law.

III.

THE RELIEF UPHELD IN EX PARTE YOUNG WAS NOT "PROSPECTIVE ONLY" AS STATED IN THE MAJORITY OPINION

The majority opinion relies almost exclusively on the authority of *Ex Parte Young* to support its holding that prospective relief against state officers is not barred by the Eleventh Amendment, but retrospective relief to those persons who are actually injured by the illegal actions of state officers is barred by the Eleventh Amendment. The majority opinion states:

> "But the relief awarded in *Ex Parte Young* was prospective only; the Attorney General was enjoined to conform his future conduct of that office to the requirements of the Fourteenth Amendment."

This reading of *Ex Parte Young* overlooks the fact that the relief entered by the Court of Appeals was both prospective and retrospective in nature, and that the majority opinion in *Ex Parte Young* expressly approved of earlier decisions granting retrospective relief. The facts of *Ex Parte Young* were that the federal court first issued a temporary restraining order and later a preliminary injunction enjoining the defendant from enforcing the allegedly confiscatory rates set by statute. The day after the preliminary injunction was issued, Young sued in state court for a writ of mandamus against the railroads to compel them to comply with the new law. He was adjudged guilty of contempt by the Court of Appeals for this action, fined $100 and ordered to jail until he dismissed the state mandamus proceeding. Young then applied to the Supreme Court for a writ of habeas corpus to free him from the custody of the marshal, and also for leave to file a

petition for writ of certiorari. As the Supreme Court stated in its opinion, "The case involves the validity of the order of the Circuit committing him for contempt." *Ex Parte Young* at 126-127. The contempt order, then, involved not just prospective relief, but indeed required Young in his official capacity to take action dismissing the mandamus proceeding in state court previously filed. Such relief is clearly retrospective in nature. The ultimate decision of the Court upholding the contempt order is clear authority that the Court in *Ex Parte Young* did not believe there were any distinctions between prospective or retrospective relief vis-a-vis the Eleventh Amendment when state officers were acting in contravention of federal law.

Further support for this conclusion is found in the portion of the opinion of the majority in *Ex Parte Young* relying on the earlier case of *Osborn v. Bank of United States.*

> "[T]he only difference in regard to the case of *Osborn* and the case in hand being that in this case the injury complained of is the threatened commencement of suits, civil or criminal, to enforce the act, instead of, as in the *Osborn* case, an actual and direct trespass upon or interference with tangible property. A bill filed to prevent the commencement of suits to enforce an unconstitutional act, under the circumstances already mentioned, is no new invention, as we have already seen. The difference between an actual and direct interference with tangible property and the enjoining of state officers from enforcing an unconstitutional act is not of a radical nature and does not extend, in truth, the jurisdiction of the courts over the subject matter. In the case of the interference with property, the person enjoined is assuming to act in his capacity as an official of the

state, and justification for his interference is claimed by reason of his position as a state official. Such official cannot so justify when acting under an unconstitutional enactment of the legislature. So, when the state official, instead of directly interfering with tangible property, is about to commence suits which have for their object the enforcement of an act which violates the Federal Constitution, to the great and irreparable injury of the complainants, he is seeking the same justification for the authority of the state as in other cases. The sovereignty of the state is, in reality, no more involved in one case than in the other. The state cannot, in either case, impart to the official immunity from responsibility to the supreme authority of the United States." *Ex Parte Young* at 167.

Thus, the reliance by this Court on the decision in *Ex Parte Young* for its distinction between prospective and retrospective relief is misplaced. On the contrary, the rationale, the facts, and the holding of *Ex Parte Young* clearly support the principle that the federal courts may grant appropriate relief to plaintiffs who are injured by illegal actions of state officers in contravention of federal law.[3]

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[3]The Court's statement that "were we to uphold this [retrospective] portion of the District Court's decree, we would be obligated to overrule the Court's holding in *Ford Motor Co. v. Dept. of Treasury, supra*," overlooks the principle of that case, and the other tax cases of the 1940's. As stated in *Steffel v. Thompson*, ____ U.S. ____ (March 20, 1974), those cases involved situations

> "in which principles of federalism militated altogether against federal intervention into a class of adjudications. See *Great Lakes Co. v. Huffman*, 319 U.S. 293 (1943)

IV.

BASED ON ILLINOIS LAW AN ORDER FOR RETROACTIVE PAYMENTS WOULD NOT REDUCE THE FIXED APPROPRIATION FOR PUBLIC AID.

Absent the authority of *Ex Parte Young*, the only reason presented in the majority opinion for the prospective/retrospective distinction is found in footnote 11. There, the Courts asserts that the financial impact of prospective relief and retrospective relief is different because of

> "the fact that where the state has a definable allocation to be used in the payment of public aid benefits, and pursues a certain course of action such as the processing of applications within certain time periods as did Illinois here, the subsequent ordering by a federal court of retroactive payments to correct delays in such processing will invariably mean there is less money available for payments for the continuing obligations of the public aid system."

This assertion of fact, however, is plainly erroneous in Illinois. Indeed exactly the opposite is true. Prospective mandatory injunctive relief requires additional allocation of funds out of current appropriations and will result in less money available for payments for the continuing obligations of the public

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(federal policy against interfering with the enforcement of state tax laws);[20]

[20]In *Great Lakes Co. v. Huffman* . . . the Court, recognizing the unique effects of anticipatory adjudication on tax administration, held that declaratory relief should be withheld when the taxpayer was provided an opportunity to maintain a refund suit after payment of the disputed tax. . . ."

aid system. On the other hand, any judgment for back benefits, if obtainable at all, would not be imposed upon the "definable allocation" of current appropriations. Instead, according to the Director of the Illinois Department of Public Aid (Pet. Br. at 34-36) since such relief would relate to the period when the appropriations had lapsed (Ill. Rev. Stat., ch. 127, §161), payments of these funds would have to be made from a special annual appropriation.

> "The General Assembly hereby creates the Court of Claims Fund and shall make annual appropriations thereto from which the Court may direct immediate payment of: (a) all claims arising solely as a result of the lapsing of an appropriation out of which the obligation could have been paid." Ill. Rev. Stat., ch. 37, §439.24 (1973)

In other words, the retroactive benefits awarded by the District Court in this case, if they may be secured at all, would ultimately be paid from a special appropriation which would not in any way reduce the amount of money available out of the current appropriation.

V.

THE PLAINTIFFS IN THIS CASE HAVE NO MEANS OF ENFORCING THEIR 1983 CLAIM IN THE STATE COURTS OF ILLINOIS.

Moreover, there is serious doubt whether the plaintiff class may bring their 1983 claim in the state courts. There is no provision for bringing claims based on violations of federal law in the Illinois Court of Claims. Ill. Rev. Stat., ch. 37, §439.8. And in *Chicago Welfare Rights Organ. v. Edelman*, 56 Ill. 2d 33, 305 N.E. 2d 140 (1973) (appeal docketed in the Supreme Court, No. 73-1386), the Illinois Supreme Court held that a 1983 claim may not be brought in the state courts, or,

at best, that such claim may only be brought pursuant to administrative remedies under the Illinois Administrative Review Act, Ill. Rev. Stat., ch. 110, §264 *et seq.* Under the latter interpretation, plaintiffs would only be able to proceed individually; there is no authority for proceeding as a class under the Illinois Public Aid Code, ch. 23, §11-8 and the Illinois Administrative Review Act, *supra.* Thus the members of the plaintiff class have no remedy in the Illinois courts, and this Court's decision deprives them of a remedy in the federal courts. Under these circumstances, plaintiffs are denied their rights to due process and equal protection of the laws guaranteed by the Fourteenth Amendment. See *General Oil v. Crain,* 209 U.S. 211, 226-27 (1908). Accordingly, it is submitted that this Court should grant this petition for rehearing and set this cause for re-argument in conjunction with the appeal in *Chicago Welfare Rights Organization v. Edelman,* No. 73-1386.

CONCLUSION

For all of the foregoing reasons, the plaintiffs urge this Court to grant the petition for rehearing.

Respectfully submitted,

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April 16, 1974

CERTIFICATE OF COUNSEL

I, SHELDON ROODMAN, attorney for the plaintiffs-petitioners, certify that this Petition is presented in good faith and not for purposes of delay.

SHELDON ROODMAN